

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2015-CA-00596

H.A.S. ELECTRICAL CONTRACTORS, INC.

APPELLANT

v.

HEMPHILL CONSTRUCTION COMPANY, INC.

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the justices of this Court may evaluate possible disqualification or recusal:

1. The Honorable Judge John Huey Emfinger, Trial Judge
2. Jim Davis, Esq., counsel for Appellant
3. Danny A. Drake, Esq. and David B. Ellis, Esq., Mockbee Hall & Drake, P.A., counsel for Appellee;
4. H.A.S. Electrical Contractors, Inc., the Appellant
5. Hemphill Construction Company, Inc., the Appellee

Respectfully submitted this the 21st day of October, 2015.

/s/David B.Ellis

DANNY A. DRAKE, ESQ.

DAVID B. ELLIS, ESQ.

Attorneys of record for Appellee

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IV. STATEMENT REGARDING ORAL ARGUMENT

Hemphill Construction Co., Inc. ("Hemphill") respectfully suggests that oral argument is not necessary in this case and would not be of assistance to the Court in resolving the issues presented.

V. STATEMENT OF THE ISSUES

The Appellant, H.A.S. Electrical Contractors, Inc. ("H.A.S.") has raised three (3) issues on appeal, which can be characterized as follows:

- (1) Whether the trial court's actions were clearly erroneous in overruling H.A.S.' Batson challenge to Hemphill's peremptory strikes of two (2) black jurors;
- (2) Whether the trial court erred in enforcing an unambiguous provision in the parties' contract which required H.A.S. to pay Hemphill's reasonable attorneys' fees and expenses; and,
- (3) Whether the amount of attorneys' fees awarded to Hemphill by the trial court was reasonable.

VI. STATEMENT OF THE CASE

A. Nature of the Case.

Hemphill, as general contractor, entered into a subcontract agreement with H.A.S., as subcontractor, for the performance of the electrical portion of an infrastructure rebuild project for the State of Mississippi at Buccaneer State Park after Hurricane

Katrina. H.A.S. alleged it was not fully compensated for the work performed and filed suit on March 26, 2012 alleging breach of contract, quantum meruit, and conversion and requesting approximately \$570,000.00 in damages. Hemphill denied liability and filed a Counterclaim on May 21, 2012, alleging breach of contract and requesting \$23,677.04 in damages, plus attorneys fees and expenses.

Following a jury trial, the jury handed down a verdict in favor of Hemphill on both H.A.S.'s claims and Hemphill's counterclaim. On January 13, 2015, H.A.S. filed a motion for a new trial, or, judgment notwithstanding the verdict. Hemphill filed a motion for attorneys' fees on January 20, 2015. A hearing on both post-trial motions was heard on March 17, 2015, in which the Court denied H.A.S.'s Motion and awarded Hemphill \$90,000.00 in attorneys' fees.

B. Statement of the Facts.

1. The plaintiff in this case, H.A.S., brought claims against Hemphill for breach of contract, conversion and quantum meruit, and Hemphill brought a counterclaim against H.A.S. for breach of contract. (R.9-14; R.336-39). The case was tried before a jury on January 6-8, 2015. (R.682). At trial, H.A.S. requested approximately \$270,000.00 in damages and Hemphill requested approximately \$9,000.00 in damages from H.A.S. (T.73; T.94).

2. The jury returned a verdict in Hemphill's favor both on H.A.S.' claims and on Hemphill's counterclaim, but awarded Hemphill

\$0.00 in damages. (R.594; R.E. Tab 2). A consistent judgment was subsequently entered by the Court. (R.682-83; R.E. Tab 3).

3. During jury selection, Hemphill used two of its four peremptory challenges on black male prospective jurors, and H.A.S. objected to both challenges based upon Batson. (T.50-60; R.E. Tab 1).

4. The trial court found that no pattern of discrimination existed and overruled H.A.S.'s objections. The transcript dealing with these challenges is quoted below, in relevant part:

THE COURT: That'll be Juror Number 5.
Number 7, Taylor?

Mr. DRAKE: D1.

MR. DAVIS: Judge, we'll just point out that is the first black we have reached on the panel.

THE COURT: Anything further?

MR. DAVIS: Judge, we - I guess we would go ahead and ask for a race neutral panel at this time of the venire.

THE COURT: Well, I don't see how in the world you can have a pattern after one strike, but I will, as I believe the cases say, that I should ask for a race neutral reason for Number 7, Taylor.

MR. DRAKE: Your Honor, we - - my reason, race neutral or otherwise, was age. We just thought he was - - we would prefer not to have an older jury panel.

THE COURT: Any response?

MR. DAVIS: They had accepted Number 2, who is 68 years old, and Number 5 that was 62 years old, but they were both white.

THE COURT: All right. Well, I believe that there's not a pattern. That's the first person - - that's the first black that's been presented. I don't believe that there's any pattern possible. The older venire, whether there's one or two, or three, I don't believe that's good reason so I'm going to - - I'm going to recognize the strike. What does the Defense say to Number 8, Johnson?

MR. DRAKE: We accept.

THE COURT: That'll be Juror Number 6. Number 9, Anderson?

MR. DRAKE: Accept.

THE COURT: That'll be Juror Number 7. Number 11, Walker?

MR. DRAKE: One second, Your Honor. We accept.

THE COURT: That'll be Juror Number 8. Number 12, Gay?

MR. DRAKE: We accept.

THE COURT: That'll be Juror Number 9. Number 13, Calhoun?

MR. DRAKE: That's D2.

MR. DAVIS: He's only used two strikes and they've both been on blacks at this time and he has struck 50 percent of them.

THE COURT: I'm going to let you make that objection at the end here.

(Batson Challenge by Mr. Davis)

MR. DAVIS: Judge, of course, he has now struck Mr. Calhoun. The blacks that we have reached on jury venire, Number 7, Don Taylor; Number 8, Kadreanna Johnson; Number 9, Mr. Anderson, and; Number 13, Mr. Calhoun. Today, he has only used two strikes at the

time we were at Juror Number 13, and both of them were on black males, and there has only been four blacks reached on the venire at this time and he has struck 50 percent of them.

THE COURT: All right. I will note for the record that Juror Number 7, that was D1, is a black male;

Juror Number 8, that was accepted, is a black female;

Juror Number 9, that was accepted, is a black male, and;

Juror Number 13 is a black male.

So, to my count, there have been four blacks tendered. He's exercised strikes on two and accepted two. I don't believe that there is a pattern showing discrimination, but I'm going to ask for a race neutral reason relative to Juror Number 13.

MR. DRAKE: He showed his employer as Labor Ready. There's a number of issues here about, in this case, about part-time and temporary employees and we think that would -- he would have a bias toward the Plaintiff in this matter.

THE COURT: What says the Plaintiff?

MR. DAVIS: One second, your Honor. We wouldn't accept that as a race neutral reason, your Honor.

THE COURT: You said you do?

MR. DAVIS: Do not. Would not.

THE COURT: All right. I do. I'm going to uphold the strike on that.

(T.52-53, 54-55; R.E. Tab 1).

5. According to H.A.S., the potential petit jury pool for this case consisted of two panels of twelve jurors each, or twenty-four total prospective jurors, of which four were black and twenty were white (16.67% black). (R.595-97). The jury which was

empaneled in the case which rendered its verdict in favor of Hemphill consisted of ten white persons and two black persons (16.67% black). (T.54-56; R.E. Tab 1).

6. After evidence was presented to the jury by both sides, the trial court gave jury instructions to the jury, including Jury Instruction #7, which was not objected to by Appellant, and which stated in relevant part that, "[y]ou are further instructed that the contract signed by the parties in this case must be enforced as written." (R.589; T.530-531)

6. After the trial, Hemphill timely filed its Motion for Award of Attorneys' Fees and Expenses based upon a clause in the parties' contract which provides as follows:

21. ATTORNEYS FEES

As the prevailing party in any dispute between the parties arising out of or related to this Subcontract or the breach thereof, Contractor shall be entitled to recover its reasonable attorneys' fees and expenses incurred in pursuing or defending any claim.

(R.609-77). Hemphill submitted an Affidavit from David W. Mockbee, Esq. in support of its motion as to the reasonableness of the fees requested. (R. 669-677).

7. After a hearing on the Motion, the trial court awarded Hemphill attorneys' fees and expenses in the amount of \$90,000.00, which was a reduction of the amount requested by Hemphill, which was at least \$101,787.71. (R.609-14, 695; R.E. Tab 4). The trial court reduced the amount of attorneys' fees awarded in part because

it did not award Hemphill any attorneys' fees incurred in prosecuting Hemphill's counterclaim even though Hemphill already provided such a reduction in its request. (Supp.T.7-10).

VII. SUMMARY OF THE ARGUMENT

The trial court correctly ruled in favor of Hemphill in allowing the peremptory strikes at issue because H.A.S. failed to show a prima facie case of discrimination. The trial court also correctly ruled in favor of Hemphill on its Motion for Award of Attorneys' Fees and Expenses. The binding and enforceable contract between these two commercial entities contained a valid attorneys' fees clause that entitled Hemphill to the award given in light of the jury ruling in Hemphill's favor on both H.A.S.'s claim and Hemphill's counterclaim. This is especially true since there was no evidence presented at trial of any type of unconscionability or unfairness of the parties' contract.

VIII. ARGUMENT

A. Standard of Review

Regarding Batson, "[The appellate court's] review requires a reversal only if the factual findings of the trial judge are clearly erroneous or against the overwhelming weight of the evidence." Williams v. State, 909 So.2d 1233, 1236 (Miss. Ct. App. 2005)(internal citations omitted). "Any determination made by a trial judge under Batson is accorded great deference because it is 'based, in a large part, on credibility.'" Id. "The term great deference has been defined in the Batson context as meaning an

insulation from appellate reversal of any trial findings which are not clearly erroneous." Id.

This Court's standard of review for an award of attorneys' fees is abuse of discretion. See, Deer Creek Construction Co.v. Peterson, 412 So.2d 1169, 1173 (Miss. 1982) ("We will not reverse the trial court on the question of attorneys' fees unless there is a manifest abuse of discretion in making the allowance.") However, "[t]he court's conclusions of law underlying the fee award are reviewed de novo. Wal-Mart Stores, Inc. v. Qore, Inc., 2011 U.S. App. LEXIS 20413 (5th Cir. 2011).

B. The trial court's findings that there was no impermissible discrimination by Hemphill during jury selection were not clearly erroneous and therefore should not be disturbed on appeal.

Plaintiff's Batson argument fails because Appellant failed to make a prima facie case of impermissible discrimination on the basis of race. As cited in Appellant's brief, Mississippi law requires that, "[f]irst, the party objecting to the peremptory strike of a potential juror must make a prima facie case showing that race was the criterion for the strike." Hardison v. State, 94 So.3d 1092, 1098 (Miss. 2012)(citing Batson v. Kentucky, 476 U.S. 79 (1986)). To make a prima facie case, a party must have ". . . met the burden of showing that the proponent has engaged in a pattern or practice of strikes based on race or gender." Id. Stated differently, the inquiry is whether "...the facts and circumstances surrounding the use of the peremptory challenge raise an inference of discriminatory purpose on the part of the party

making the challenges to strike minorities." Butler v. State, 19 So.3d 11, 116 (Miss. Ct. App. 2009). The burden does not shift back to the proponent of the peremptory strike unless and until the opponent makes a prima facie case of discrimination. Id.

Appellant's Batson argument rests almost solely upon Hardison v. State, 94 So.3d 1092 (Miss. 2012), but Hardison is distinguishable, and actually supports Hemphill's position. In Hardison, a reverse-Batson situation, the Supreme Court overturned a trial court's decision to deny a peremptory strike to a defendant. The Supreme Court did not necessarily agree with the trial court that a prima facie case of discrimination had been made, but only held that, when defense counsel made four peremptory challenges of white prospective jurors, that "[b]ased upon this Court's highly deferential standard, we cannot say that the trial court erred by finding a prima facie case of racial discrimination." Id. at 1098.

In the present case, the trial court found that no pattern of discrimination was present and therefore did not have to even request a race-neutral reason from Hemphill for its use of peremptory challenges. However, the trial court did in fact request a race-neutral reason for each of Hemphill's two peremptory challenges, which Hemphill provided. The following cases upheld trial courts' holdings that a prima facie case of discrimination had not been made in alleged racial discrimination Batson cases: Dennis v. State, 555 So. 2d 679 (Miss. 1989)(5 of 7 peremptory

challenges used on blacks); Dora v. State, 20 So.3d 46 (Miss. Ct. App. 2009)(4 of 5 peremptory challenges used on blacks); Ramsey v. State, 998 So.2d 1016 (Miss. Ct. App. 2008)(3 of 4 peremptory challenges used on blacks); Butler v. State, 19 So.3d 111 (Miss. Ct. App. 2009)(4 of 6 peremptory challenges used on blacks).

In Dennis, the Supreme Court upheld a trial court's ruling against a Batson challenge by the defense where the prosecutor exercised five of seven peremptory strikes against black jurors and the prosecutor left several challenges unused. Id. Numerous black jurors were left uncalled and one was seated on the trial jury. Id. The present case is similar to Dennis because, while Hemphill did exercise two peremptory strikes on black jurors, Hemphill had two remaining peremptory strikes which it did not use on the two black jurors which actually served on the trial jury. Before using its second peremptory strike on Mr. Rodney Calhoun, a black male juror, Hemphill accepted two black jurors, Ms. Kadreanna Johnson, and Mr. John W. Anderson.

According to the cases, the key analysis in determining whether a prima facie case of discrimination has been made is whether the facts and circumstances give rise to a discriminatory purpose. See Hardison v. State, 94 So.3d 1092 (Miss. 2012); Butler v. State, 19 So.3d 111 (Miss. Ct. App. 2009); Dora v. State, 20 So.3d 46 (Miss. Ct. App. 2009). In this case, the trial court did not find that a prima facie case had been made based upon the facts and circumstances which show no such discriminatory purpose,

particularly because; (1) the percentage of black jurors seated, 16.67%, was the same as that of the panels of prospective jurors from which they were chosen, (2) Hemphill allowed two black jurors to be seated on the jury despite still having peremptory challenges available, (3) Hemphill gave valid race-neutral reasons for the two peremptory challenges it used, and (4) all parties, attorneys, and witnesses at trial were white. As such, this Court should not disturb the trial court's finding that no discriminatory purpose was present.

C. The trial court did not err in awarding \$90,000.00 in attorneys' fees and expenses to Hemphill.

1. Multi-million dollar contracts between commercial entities are not subject to a routine "unconscionability" analysis.

In Mississippi, attorneys' fees may only be awarded when they are provided for by statute, when one party is entitled to punitive damages, or, as in the present case, when the parties agree by contract. Indus. & Mech. Constrs. of Memphis, Inc. v. Tim Mote Plumbing, LLC, 962 So.2d 632, 638 (Miss. Ct. App. 2007). If a contract is enforceable, then it would be contrary to the law to refuse to enforce an attorneys' fees clause therein. Id. While a one-sided attorneys' fees clause might in some instances be invalidated in consumer transaction cases where one side has unequal bargaining power, such as the cases cited by Appellant, but in cases such as the case at bar where the parties are both commercial entities they have routinely been enforced. See

Upchurch Plumbing, Inc. v. Greenwood Utilities Commission, 964 So.2d 1100 (Miss. 2007)(one-sided clause enforced in construction case); Indus. & Mech. Contrs. of Memphis, Inc. v. Tim Mote Plumbing, LLC, 962 So. 2d 632, 638 (Miss. Ct. App. 2007)(one-sided clause enforced between contractor and subcontractor); Philips Medical Capital, LLC v. P&L Contracting, Inc., 2012 U.S. Dist. LEXIS 34368 (S.D. Miss. March 13, 2012)(one-sided clause enforced between lessor and lessee).

As the trial court found, both Hemphill and H.A.S. are sophisticated businesses who are familiar with contracts and the construction process. Further, H.A.S. did not object to a jury instruction which stated that "the contract signed by the parties in this case must be enforced as written." Therefore, there is no evidence of any potential unconscionability present and the terms of the parties' contract were properly enforced, including the attorneys' fees clause.

2. Hemphill was the prevailing party.

The trial court properly awarded Hemphill its attorneys' fees and expenses because, as contractually required, Hemphill prevailed at trial. All of the cases cited by the Appellant in support of their argument on this issue are "open account" cases, which deal with Mississippi's open account statute, Miss. Code Ann. §11-53-81, which clearly states, in relevant part, that attorneys' fees can only be awarded ". . . when judgment on the claim is rendered in favor of the plaintiff." The Supreme Court has held that the open

account statute should be strictly construed, and that in order for a plaintiff to be awarded attorneys' fees under the statute, "the plaintiff must secure a 'judgment on the claim' in the amount sued for." Barnes, Broom, Dallas & McLeod, PLLC v. Estate of Cappaert, 991 So.2d 1209, 1214 (Miss. 2008).

On the contrary, when attorneys' fees are awarded to a party based upon a contract clause, there is no such requirement that judgment be rendered in the amount sued for. See Wal-Mart Stores, Inc. v. Qore, Inc., 2011 U.S. App. LEXIS 20413 (5th Cir. 2011). To this point, the Fifth Circuit has held that, when analyzing whether a party is the "prevailing party", the key point is "whether the plaintiff prevailed on the central issue by acquiring the primary relief sought." Cobb v. Miller, 818 F.2d 1227, 1231 (5th Cir. 1987). Further, "a fee award should not necessarily be reduced simply because the plaintiff failed to prevail on every contention in the lawsuit. Id. at 1233.

The jury's verdict clearly found for Hemphill on both H.A.S. claims and Hemphill's counterclaim. However, since the jury did not award Hemphill any damages on its counterclaim, the trial court reduced Hemphill's request for attorneys' fees by a significant amount, from \$101,787.71 to \$90,000.00, even though Hemphill had already accounted for same in its request. The Court's reduction was also more than equitable here because the claims and counterclaims in this matter were so intertwined that it took very little effort for Hemphill to prosecute its counterclaim as opposed

to defending H.A.S.'s claims. Again, H.A.S. sought at trial to recover \$270,000.00 and Hemphill's counterclaim only sought \$9,000.00. There can be no doubt that Hemphill was the prevailing party in defending H.A.S.'s claims when judgment was rendered in Hemphill's favor on those claims, thus the award of attorneys' fees to Hemphill was proper.

3. The amount of attorneys' fees and expenses requested was reasonable.

In order to sustain an award for attorneys' fees, the amount requested must be reasonable. Miss. Code Ann. §9-1-41 provides the general rule as to awards of attorneys' fees:

In any action in which a court is authorized to award reasonable attorney's fees, the court shall not require the party seeking fees to put on proof as to the reasonableness of the amount sought, but shall make the award based on the information already before it and the court's own opinion based on experience and observation; provided, however, a party may, in its discretion, place before the court other evidence as to the reasonableness of the amount of the award, and the court may consider such evidence in making the award.

As shown by the Affidavit of David Mockbee, Esquire, the attorneys' fees charged to Hemphill in this matter were reasonable. At the hearing on Hemphill's Motion for Award of Attorneys' Fees, the trial court analyzed the reasonableness factors, and awarded \$90,000.00 in attorneys' fees and expenses to Hemphill. H.A.S. put on no evidence at the hearing on attorneys' fees in regards to reasonableness nor did it provide any argument on the issue. As

such, the trial court considered the evidence provided by Hemphill, then reduced Hemphill's requested amount again by over \$10,000.00 with no apparent basis, from \$101,787.81, to \$90,000.00. As such, the award of \$90,000.00 is more than fair to H.A.S., and certainly should be upheld on appeal.

4. Should Hemphill prevail on this appeal, it should be awarded its attorneys' fees and expenses incurred.

If this case is affirmed, Hemphill's status as the "prevailing party" in this litigation will remain unchanged, therefore Hemphill is contractually entitled to its reasonable attorneys' fees and expenses incurred since it initially filed its Motion for Attorneys' Fees and Expenses in the trial court. As such, Hemphill requests that this Court include in its opinion an award of its further attorneys' fees and expenses in an amount to be determined by the trial court upon motion.

IX. CONCLUSION

The trial court did not err when it overruled Appellant's Batson challenges, nor did it err by awarding \$90,000.00 in attorneys' fees and expenses to Hemphill. As such, this Court should affirm the decisions of the trial court and award Hemphill its attorneys' fees and expenses incurred in defending this appeal, in an amount to be determined by the trial court.

Respectfully submitted,

HEMPHILL CONSTRUCTION CO., INC.

By its attorneys,

MOCKBEE HALL & DRAKE, P.A.

By: /s/ David B. Ellis

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X. CERTIFICATE OF SERVICE

I, David B. Ellis, do hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system and served via U.S. Mail the following:

The Honorable John H. Emfinger
Circuit Court Judge
Post Office Box 1885
Brandon, MS 39043

On this the 21st day of October, 2015.

/s/David B. Ellis
David B. Ellis